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Before the
Federal Communications Commission
Washington, D.C. 20554

Oct 21 5:11 PM '94

MM Docket No. 93-89

In re Applications of

AURIO A. MATOS File No. BPH-911114MS

LLOYD File No. BPH-911115MP

SANTIAGO-SANTOS AND
LOURDES RODRIGUEZ BONET

For Construction Permit for
New FM Station, Channel 293A,
Culebra, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1994; Released: October 11, 1994

By the Review Board: MARINO (Chairman) and
GREENE.

1. The Review Board has before it a Joint Request for Approval of Settlement Agreement filed by Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez Bonet (Santiago and Rodriguez) on March 8, 1994, and supplemented on July 22, August 15, and August 22, 1994.¹ The Mass Media Bureau filed Comments on April 28 and August 4, 1994, opposing approval of the Settlement Agreement. We shall deny the Joint Request for the reasons set forth below.

2. In an *Initial Decision*, 8 FCC Rcd 7920 (1993) (*I.D.*), Administrative Law Judge Joseph P. Gonzales granted Matos' application based on that applicant's putative comparative superiority.² While exceptions to the *I.D.* were pending before the Board, Matos reported on January 28, 1994, that he had recently been informed by the United States Fish and Wildlife Service that he would not be granted a Special Use Permit necessary for effectuating his transmitter site proposal. Also on that date, the Bureau filed a motion seeking issues to determine whether Matos timely reported the loss of his transmitter site and whether

he has reasonable assurance of the availability of the site. Matos opposed the motion and has since petitioned to amend to a new site.

3. The Joint Request, as supplemented, contemplates: (1) the grant of the Matos application, as amended; (2) the dismissal of the Santiago and Rodriguez application in return for \$50,000, an amount purportedly less than Santiago and Rodriguez' legitimate and prudent expenses incurred in prosecuting their application; and (3) the hiring of Santiago and Rodriguez on the issuance of the construction permit as part-time consultants for two years for \$25,000 each, a total of \$50,000. Consummation of the Settlement Agreement is contingent upon its approval by the Commission. *See* Jt. Request at 2-3.³ The Agreement further provides:

In the event that any provision contained in the Agreement shall for any reason be found to be invalid, illegal or unenforceable ... *the parties will use their best efforts to amend the Agreement to create a legal, valid and enforceable contract to perform their respective obligations under Agreement.*

See Settlement Agreement at ¶ 11 (Emphasis added).

4. The parties have responded to Bureau questions concerning their expenses with sufficient documentation, and no questions therefore remain about the reimbursable expenses under the Settlement Agreement. The existing obstacles to grant of the Joint Request are the consulting agreements with Santiago and Rodriguez, which are essential to the settlement. *See* Supplement to Jt. Request, July 22, 1994, Exh. B. Each agreement provides at ¶ 3:

Matos agrees to pay [the consultant] the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00) per year for each of the two years as compensation for . . . part-time services. Such compensation shall be paid to [the consultant] in monthly installments of One Thousand Forty Dollars (\$1,040.00) on the last day of every month during the term of this Agreement. To arrive at the annual salary, monthly payments for the twelfth and twenty-fourth month will be One Thousand Sixty Dollars (\$1,060.00). The Parties anticipate that [the consultant] will work approximately Forty (40) hours per month for an hourly salary of Twenty Six Dollars (\$26.00) per hour.

¹ The supplemental information submitted on August 22, 1994 was contained in a pleading styled "Response to Comments of Mass Media Bureau." Earlier, in comments filed on April 28, 1994, the Mass Media Bureau, had argued, *inter alia*, that the original settlement agreement was in draft form, rather than a final document, and thus not grantable. By *Order*, 9 FCC Rcd 3132 (Rev. Bd. 1994), the Board agreed with the Bureau and directed the settling parties to submit all documents supporting their proposed settlement agreement. The supplements have been filed in response to that *Order*, as well as to other challenges noted in subsequent Bureau pleadings.

² Subsequently, the Court, in *Bechtel v. FCC*, 10 F. 3d 875 (D.C. Cir. 1993), held that the application of the comparative

integration criterion in cases such as this one is unlawful; and the Commission froze the comparative consideration of applications. *See Public Notice* "FCC Freezes Comparative Proceedings," 9 FCC Rcd 1055 (1994), *modified in part*, FCC 94-204, released August 4, 1994.

³ Consummation of the Agreement is further contingent on the Commission's acceptance of the site amendments and the denial of the Bureau's motion to enlarge issues. In light of our disposition denying the Joint Request, we do not reach either the Bureau's motion to enlarge issues or the amendments concerning the new site, which are opposed by the Bureau for reasons raised in its motion to enlarge.

In addition, within ten days of issuance of the construction permit, Matos must place the first year salary into an escrow account for each consultant. Consulting Agreement ¶ 4. The salary for the second year must be placed in the account a year later.

5. The escrow agreements require the escrow agent to forward the monthly payments directly to Santiago and Rodriguez unless the agent is notified in writing at least three days prior to the payment date by Matos that Santiago and Rodriguez failed to meet their obligations under paragraphs 5 or 7 of the consulting agreements. See Supplement to Jt. Request, August 15, 1994, Exhibits A and B (Escrow Agreements) ¶ 2. Those provisions, in turn, prohibit Santiago and Rodriguez from providing consulting services to other radio stations in the market and allow for the termination of the consulting agreements should Santiago and Rodriguez fail to perform their "assigned services" to Matos or provide consulting services elsewhere. Santiago proposes to provide services "relating to the establishment of sales record keeping systems, marketing strategies and promotional strategies" under Matos' direction; Rodriguez will provide services "relating to the establishment of accounting and bookkeeping systems and formulation of cost and revenue projections," also under Matos' direction. Consulting Agreements, at ¶ 2.

6. The Bureau contends that the consulting agreements raise serious questions concerning the *bona fides* of the proposed settlement. It argues initially that the consulting agreements do not "require" Santiago or Rodriguez to furnish any minimum number of hours of work in consideration for their salaries, citing to *Gifford Orion Broadcasting, Ltd.*, 9 FCC Rcd 314, 315, n.4 (Assoc. Gen. Counsel 1993). It further characterizes the description of Santiago and Rodriguez' proposed services as "unreasonabl[y] vague," and challenges Matos' need for Santiago and Rodriguez' services as questionable, inasmuch as Matos is an experienced broadcaster in his own right and has served as the general manager of three radio stations since 1980. See Comments on Supplement, August 4, 1994, at 3-4. The Bureau reports: "In sum, [we are] unable to conclude that the consulting arrangement is not a sham to skirt the Commission's limitations on reimbursable expenses." *Id.*, at 4. In reply, the settling parties disagree that there is no minimum number of hours requirement, arguing that the "whereas" clauses of the escrow agreements provide that Santiago and Rodriguez will work 40 hours per month. See Response to Comments, August 22, 1994, at 3. They also note that paragraph 7 of the consulting agreements gives Matos the right to terminate the agreements in the event that Santiago or Rodriguez fail to perform their assigned services. *Id.*

DISCUSSION

7. The Commission has emphasized that applicants entering into agreements settling comparative application proceedings may not receive monetary compensation for dismissing their applications in excess of the legitimate and prudent expenses incurred in processing their applications. 47 CFR 73.3525; see also *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85, 87 ¶ 17 & n.56 (1990), *partial recon. granted on other grounds*, 6 FCC Rcd 2901 (1991). Parties to a settlement must submit any ancillary agreements, including any consulting agreements, and must persuade the agency that any

such agreement is *bona fide* rather than a device to elude the compensation limit. *Texas Television, Inc.*, 91 FCC 2d 1043, 1045 (Rev. Bd.), *modified on reconsideration*, 91 FCC 2d 1047 (1982), *rev. denied*, FCC 83-95 (released Mar. 9, 1983); *Venton Corp.*, 90 FCC 2d 307, 314 (1982). In light of the Commission's considerable effort in recent years to keep the comparative hearing process free of egregious applicant abuses, see generally *Gifford Orion Broadcasting, Ltd.*, 8 FCC Rcd 3577, 3579 ¶ 10 (Rev. Bd.), *rev. granted*, 9 FCC Rcd 314 (1993), we must view consulting agreements between former adversaries with a fair degree of skepticism and give them close scrutiny.

8. In reviewing Matos' consulting agreements with Santiago and Rodriguez, which clearly are part of the consideration for the settlement agreement before us, we, like the Bureau, are unable to find that "the [consulting] payment is fair compensation for services actually to be rendered by [the putative consultants], rather than [im-permissible] consideration for [the] agreement to dismiss [the] application." *Gifford Orion*, 9 FCC Rcd at 315 n. 6. Nothing within the four corners of the agreements assures us that any consulting services actually will be rendered in exchange for the payments required by the agreements. Payments under the accompanying escrow agreements are automatic, starting shortly after the construction permit is issued, and may be withheld from either putative consultant *only* if Matos notifies the escrow agent in writing that the consultant "has failed to meet [his/her] obligations" by failing to perform "assigned services" or by providing similar services for another station in the market. Supplement to Jt. Request, August 15, 1994, Exhs. A & B, ¶ 2, Escrow Agreements; Supplement to Jt. Request, July 22, 1994, Exh. B, Consulting Agreements ¶ 7. Nowhere in either consulting agreement is there any commitment to a minimum amount of consulting time or any particular results from the consulting arrangement -- or even a commitment by Matos to use the services of Santiago or Rodriguez at all. As we read the Escrow Agreements, if Matos does not ask for service, he cannot withhold payment. The parties have argued that the language of paragraph 3 of each Consulting Agreement, that the parties "anticipate that [Santiago and Rodriguez] will work approximately 40 hours per month for an hourly salary of Twenty Six Dollars (\$26.00)," (emphasis added) shows their "intent," as do the "whereas" clauses in each Escrow Agreement. Response to Comments of Mass Media Bureau at 3. But, intent and anticipation are not commitments and do not assuage our concerns about the *bona fides* of these consulting agreements; and the language relied on in the Escrow Agreements' whereas clauses merely describes the Consulting Agreements. Compare *Gifford Orion*, 9 FCC Rcd at 315 n.6, accepting a revised consultancy agreement after a provision specifying a maximum number of hours was replaced with one specifying a minimum and maximum number.

9. The Bureau has additionally questioned the vagueness of Santiago's and Rodriguez' services and Matos' need for their services in light of the latter's more extensive broadcast experience, questions also going to the likelihood that Matos will assign Santiago and Rodriguez tasks under the Consulting Agreements. In *Gifford Orion*, a similar question about the need for consulting services was resolved favorably to the settling applicants when they showed that the putative consultant's experience was somewhat different from and thus supplemented the grantee's experience. Here the parties' have not directly responded to these Bureau's concerns nor offered adequate assurance of the *bona fides*

of the arrangement. The parties to a consulting agreement must provide assurance that work will be done and that the compensation will be appropriate for the anticipated work, the consultants' experience, and the time involved. The limited information provided here is not sufficient.⁴

10. In sum, we cannot be assured from the showing here that the \$50,000 consulting fee commitment to Santiago and Rodriguez is not an excessive payment for dismissing the Santiago-Rodriguez application in violation of the limit on settlement payments. Thus the Consulting Agreements must be disapproved. The Board's disapproval of the Consulting Agreements is not cured by the severability clause of the Settlement Agreement. Under that provision, the settlement cannot go forward until "the parties [] use their best efforts to amend the Agreement to create a legal, valid and enforceable contract to perform their respective obligations under the Agreement." Joint Request, Settlement Agreement ¶ 11.⁵ We cannot approve a settlement contingent on future compliance with § 73.3525. Because the Consulting Agreements are an essential element to the settlement, the settlement must therefore be disapproved.

11. ACCORDINGLY, IT IS ORDERED, That the Joint Request For Approval Of Settlement Agreement, filed on March 8, 1994 and supplemented on July 22 and August 15, 1994, by Aurio A. Matos and Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

⁴ The wording of the agreements provides less than an enthusiastic endorsement of either Santiago or Rodriguez as a consultant. The Santiago Consulting Agreement provides at page one: "WHEREAS, Santiago *claims* experience in broadcast management, and Matos has agreed to hire Santiago on a part-time basis for a period of two years as an Operations Consultant. (Emphasis added.) The Rodriguez Consulting Agreement provides at page one: "WHEREAS, Rodriguez *claims* experience in accounting and a general business background, and Matos has

agreed to hire Rodriguez on a part-time basis for a period of two years as a Business and Financial consultant." (Emphasis added.)

⁵ The Settlement Agreement was amended, however, to allow it to go forward even if the Commission approves a lesser sum for expense reimbursement than the parties seek. Response to Comments, August 22, 1994, Exh. A, Amendment to Settlement Agreement ¶ 1.